IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-408

City of Milwaukee, The Sewerage Commission Of The City of Milwaukee, And The Metropolitan Sewerage Commission Of The County Of Milwaukee,
Petitioners,

vs.

People Of The State Of Illinois And People Of The State Of Michigan,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

BRIEF AMICUS CURIAE OF THE STATE OF WISCONSIN

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STATEMENT OF THE CASE

We respectfully request the Court to refer to the Citation of Opinions Below, the Statement of Jurisdiction, the Citation of Statutory Provisions Involved, and the Statement of the Case presented in the brief of the City of Milwaukee, et al., filed with the Court in this proceeding.

The State of Wisconsin, by its Attorney General, respectfully submits this brief amicus curiae, in support of the appeal of the City of Milwaukee, et al., pursuant to Rule 42 (4) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Has the federal common law of nuisance survived the enactment of the Federal Water Pollution Control Act of 1972 (hereinafter FWPCA)?

2. If it has, what degree of deference should a federal court exercising that jurisdiction pay to the national regulatory scheme established by the FWPCA and to state action under that Act to enforce its requirements?

INTEREST OF AMICUS CURIAE

The United States Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 33 U.S.C. secs. 1251-1376, to provide a comprehensive, uniform, and national solution to the problem of pollution of the waters of the United States. Pursuant to sec. 402(b), 33 U.S.C. sec. 1342(b), of the Act, the enforcement obligations of the National Pollutant Discharge Elimination System in the State of Wisconsin were delegated to the Wisconsin Department of Natural Resources and the Attorney General

of the State of Wisconsin. In order to fulfill those obligations, ch. 147 of the Wisconsin Statutes was enacted in 1974. The Wisconsin Pollutant Discharge Elimination System (WPDES) created by ch. 147, Wis. Stats., is consistent with the requirements of the federal act.

Pursuant to the requirements of these state and federal laws, the Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee (hereinafter "the Commissions") applied for and obtained WPDES permits from the State of Wisconsin (hereinafter "the State") for the operation of their sewage collection and treatment facilities. When the Commissions violated the requirements of those permits, issued under ch. 147, Wis. Stats., the State of Wisconsin brought suit to enforce the requirements of the law and to secure abatement of water pollution in the area served by the Commissions.

On May 25, 1977, the State of Wisconsin concluded its enforcement action in State Circuit Court against the two Commissions with a judgment which complies with federal and state water pollution laws and standards, which comprehensively addresses the attainment of effluent limitations and abatement of combined sewer overflows, and which adequately protects the interests of residents of Illinois, Michigan, and Wisconsin in limiting discharges of pollutants to Lake Michigan.

On November 15, 1977, the United States District Court for the Northern District of Illinois concluded a suit brought by the State of Illinois against the City of Milwaukee, et al., under the federal common law of nuisance, by entering a judgment requiring the Commissions to treat all sewage to meet certain effluent limitations six times more stringent than those required under the FWPCA and to construct a

system to eliminate all overflows of raw sewage from combined sanitary and storm sewers. On April 26, 1979, the Court of Appeals for the Seventh Circuit reversed the order of the District Court insofar as it imposed effluent limitations stricter than those required under the FWPCA. It affirmed that part of the order requiring the elimination of all sewage overflows outside the combined sewer system by July 1, 1986, and further requiring the construction of a collection and conveyance system for the combined sewer system that will eliminate overflows in the combined sewer system by December 31, 1989.

The suit in the United States District Court was brought to address the same problems and to protect interests identical to those resolved in the suit in state court. While the exercise of jurisdiction by a United States District Court in these circumstances may appear compatible with that of Wisconsin, this is not in fact the case. Although attempting to reach similar goals, the remedies of the two courts may conflict in such a fashion as to frustrate the efforts of the State of Wisconsin and to usurp its enforcement authority.

This fact has far-reaching implications for the State of Wisconsin and all other states with delegated authority under the FWPCA or the Clean Water Act of 1977 (hereinafter CWA), Pub. L. No. 95-217, 33 U.S.C. secs. 1251-1376. If other jurisdictions may rely on the federal common law of nuisance as Illinois did here, while choosing to ignore the opportunities provided for participation in and enforcement through the NPDES process, conflicting results, multiplicity of suits, and frustration of the national goal of clean water will be the result. Such disruption of the NPDES state administrative and enforcement process undermines its integrity.

Accordingly, the State of Wisconsin urges this Court to determine what, if any, vitality the federal common law of nuisance maintains with respect to water pollution control suits in light of the FWPCA and the CWA. We do not dispute that a common law cause of action for nuisance may lie in an appropriate case. This is not such a case. Specific standards of pollution control have been set under comprehensive congressional legislation. Such standards must supersede the setting of others based on a federal common law. Moreover, even in areas of pollution control not specifically addressed in otherwise comprehensive legislation, the federal court is obliged to fashion a remedy consistent with the congressional program's demands, especially where a decision is likely to have a substantial effect on that program. Finally, we urge this Court to declare for the benefit of local, state, and federal government that, even where a federal court might properly exercise federal common law jurisdiction in the water pollution area, when the responsible state authorities are clearly fulfilling their enforcement obligations under the national regulatory scheme, the federal court must defer to the State's expertise in establishing the remedy.

This Court should be very wary of suggestions that the remedy imposed by the State, pursuant to congressional mandate, is not adequate. After all, the citizens of Milwaukee, Kewaunee, Manitowoc, Sheboygan, Racine, and Kenosha, Wisconsin, have as much interest in clean Lake Michigan water for drinking and recreation as do citizens of Illinois. Indeed, being closer to the source of the alleged pollution they and their state government have more reason to be concerned than does Illinois.

ARGUMENT

I. The 1977 Wisconsin Judgment Is A Major Commitment By The Petitioner Sewerage Commissions To Abatement Of Water Pollution And Will Adequately Protect The Citizens Of Illinois, Michigan, and Wisconsin.

Legal action by the State to enforce federal and state water pollution requirements culminated on May 25, 1977, in the entry of a detailed stipulation between the State and the Commissions which is incorporated in the Wisconsin Judgment. [*The Sewerage Commission of the City of Milwaukee and the Metropolitan Sewerage Commission of the County of Milwaukee v. State of Wisconsin Department of Natural Resources,* Case No. 152-342, Cir. Ct., Dane County.] The commitment made by the Commissions extends over several decades and represents a major undertaking in terms of federal, state, and local dollars expended and level of treatment achieved.

The Wisconsin Judgment is divided into sections, each of which addresses a different aspect of the water pollution problem in Milwaukee. In brief summary, the Wisconsin Judgment requires the Commissions to comply with applicable effluent limitations, to eliminate any dry weather bypassing within the service area, to eliminate all wet weather bypassing, to correct all combined sewer overflows, and to restrict all sources of additional waste flow into the system, all by prescribed deadlines. Each deadline established is specifically related to the others, so that constant maximum effort based upon established priorities is assured.

The Wisconsin Judgment is a comprehensive and balanced approach to the sources of water pollution within the control of the two Commissions. It requires the Commissions to undertake long-term, complex abatement efforts and to complete projects and components of those projects in compliance with a detailed and carefully developed schedule of deadlines. The Wisconsin Judgment exemplifies the complex and large scale nature of water pollution abatement in a major metropolitan area. But more importantly in the current context, it exemplifies the State of Wisconsin's determination to fulfill its obligations to the citizens of Wisconsin as well as other states to secure and maintain clean water within its jurisdiction, and to fully and adequately enforce the requirements of the Federal Water Pollution Control Act and the NPDES/WPDES program.

II. Congress Intended To Create A Comprehensive Scheme Of Regulation, And A Remedy Developed Pursuant To This Scheme Must Preempt Federal Common Law Approaches.

Wisconsin submits that the statutory pattern created by Congress and the legislative history to the Act shows it intended that there be a single federal decision-maker directing a comprehensive program of abatement of industrial and municipal discharges to the nation's navigable waters. *Ad hoc* approaches to solving the problems of pollution of our nation's waters were specifically rejected:

> Water pollution control in the past has all too often been sporadic, inconsistent, and improvised on an ad hoc basis. *The major purpose of this legislation is to establish a*

> *comprehensive long-range policy for the elimination of water pollution,* making it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade. At the same time, the bill provides a mechanism for generating sound, detailed information on the costs which will be associated with the later stages of the control program, and allow subsequent Congresses to evaluate the success of the policy enunciated in this bill.

[1972] *U.S. Code Cong. & Ad. News* 3758 (emphasis added).

The key to accomplishing Congress' long-range goals lay in its charge to EPA to establish and then apply direct discharge limitations to all polluters of the nation's waters. It directed EPA to develop these limitations based on the best pollution control technology which industry was capable of producing. The technological standards, once established in the administrative process,[1]/ would provide

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[1]/That it intended EPA, and EPA alone, to assume the responsibility of developing the necessary technological expertise to develop a sound program of regulation is evident from the remarks of the Senate Committee on Public Works (in reference to the "citizen suit" provision of the Act):

> Section 505 would not substitute a "common law" or court-developed definition of water quality. An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. *These matters will have been settled in the administrative procedure leading to the es-*

"manageable and precise benchmarks for enforcement," *Id.* at 3747, and courts would be relieved of the difficult technological inquiries and determinations required in this area.[2]/ Congress' wisdom in this regard is amply illustrated by the following remarks of the District Court Judge:

> Ordinarily, when the trier of fact weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.
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> The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the

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> *tablishment of such effluent control provision.* Therefore, an objective evidentiary standard will have to be met by any citizen who brings an action under this section.

[1972] *U.S. Code Cong. & Ad. News* 3745 (emphasis added).

[2]/Congress specifically noted that the courts simply do not have the technological resources to assume the role of developing pollution control standards:

> Enforcement of pollution regulations [once established by the EPA under the statutory scheme] is not a technical matter beyond the competence of the courts. The citizen suit provision is consistent with principles underly-

> heads of all of us to one height or another. I would certainly be less than candid if I did not acknowledge that grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem.

P-Ap. F-3 and 4.

The Court of Appeals noted that Congress left the door open for states to adopt standards more stringent than those set by EPA and concluded that precise uniformity was not a congressional goal. *Illinois v. City of Milwaukee,* 599 F.2d 151, 162, 164 (7th Cir. 1979). State-setting of stricter standards, however, is in keeping with the overall congressional scheme in a way that court-setting of standards is not. All state standards are adopted according to federal statutory guidelines and the state's programs are under continuing federal regulatory guidance. State-set stricter standards are a logical part of the uniform statutory scheme because they promote more vigorous anti-pollution efforts where circumstances warrant. Such standards, however, are set under the continuing supervision of the single federal oversight agency by a state agency with expertise and long-term responsibility. The critical management role assigned to the states

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> ing the Federal Water Pollution Control Act, that is the development of clear and identifiable requirements. Such requirements should provide manageable and precise benchmarks for enforcement.

[1972] *U.S. Code Cong. & Ad. News* 3747.

is consistent with the development of a uniform, "comprehensive long-range policy for the elimination of water pollution." [1972] *U. S. Code Cong. & Ad. News* 3758.[3]/ The common denominator in the process is supervision by the EPA and ultimate control by Congress. When litigants call upon courts to establish discharge limitations without regard to the congressional program, the courts, if they proceed, do so without the technological expertise forged in the administrative process, and without the guidance of the expert regulatory body.[4]/

The *ad hoc* problem-solving urged on the court in this case creates uncertainty and disarray and represents just the kind of approach Congress was seeking to avoid. It also contravenes basic interests of federalism, which demand that independent judicial remedies fashioned under a federal common law give way to congressional judgment expressed in comprehensive legislation.

The traditional sources of federal law are the federal constitution, treaties, and statutes. In *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), this Court

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[3]/It is also consistent with Congress' stated policy to "recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution." Sec. 1251 (b).

[4]/*Ad hoc* judicial creation and enforcement of controls without regard to the FWPCA is inconsistent with the further objective of the Act to "mak[e] it clear to industry and municipalities alike the pollution control performance which will be expected over the next decade."

[1972] *U.S. Code Cong. & Ad. News* 3758.

declared that there is no general federal common law. Although some federal common law has developed to resolve significant federal problems not addressed by traditional federal law sources and not appropriately resolved by resort to the varying laws of the 50 states, *Clearfield Trust Co. v. United States,* 318 U.S. 363 (1943), *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448 (1957), independent judicial determination of applicable rules of law remains the exception, not the rule. *Wheeldin v. Wheeler,* 373 U.S. 647, 651 (1963). A comprehensive congressional scheme supersedes regulation by way of resort to common law standards. And even where federal statutes are silent, courts are obliged to adhere to the policy expressed by Congress in comprehensive legislative programs. *Illinois v. Milwaukee,* 406 U.S. 91, 103 n.5 (1972); *United States v. Carson,* 372 F.2d 429, 432 (6th Cir. 1967).

Some federal common law of nuisance has emerged in the specific context of interstate pollution controversies where needed to fill in gaps in legislation and to provide a uniform rule of decision where the alternative is to apply the laws of the various states. In *Arizona v. California,* 373 U.S. 546 (1963), this Court held that an interstate dispute over water rights had to be resolved pursuant to the comprehensive scheme of allocation created by Congress, rather than according to common law rules of equitable apportionment. On the other hand, no comprehensive congressional scheme existed to resolve the interstate pollution dispute presented in *Texas v. Pankey,* 441 F.2d 236 (10th Cir. 1971) and, accordingly, the court turned to the federal common law to ensure a uniform basis for decision: "Federal common law *and not the varying common law of the individual States* is, we think, entitled and necessary to be recognized as a basis for dealing in uniform standard with the environmental rights of a State against improper impairment by sources outside its domain." *Pankey* at

241 (emphasis added). However, just "[a]s the field of federal common law has been given necessary expansion into matters of federal concern ... (where no applicable federal statute exists ...)," *Pankey* at 240, so does the field of federal common law necessarily contract where Congress has expressed its will in comprehensive legislation: "Until the field has been made the subject of comprehensive legislation or authorized administrative standards, only a federal common law basis can provide an adequate means for dealing with [these problems] ..." *Pankey* at 241.

This Court in *Illinois v. Milwaukee,* 406 U.S. 91 (1972), declared the existence of a federal common law right of action to abate pollution of interstate waters. This decision, the State submits, was a direct and necessary response to the many procedural and substantive inadequacies of the then-existing federal statutes in this area. The pre-1972 Federal Water Pollution Control Act did not mandate minimum effluent discharge standards; the Act simply authorized each state to adopt "water quality criteria applicable to interstate waters or portions thereof" within the state, *see* 33 U.S.C. sec. 1160 (c) (1). This Court has described enforcement procedures under the Act as "cumbrous," "long," and "drawn out." *Illinois v. Milwaukee,* 599 F.2d at 158, quoting *E.P.A. v. Cal. ex rel St. Water Res. Control Bd.,* 426 U.S. 200, 202 (1976) and *Illinois v. Milwaukee,* 406 U.S. at 103. Only the federal government, through the Secretary of Interior and the Attorney General, could seek court enforcement of the Act. There was no mechanism by which the states or private citizens could seek direct enforcement. Therefore, at the time this Court decided *Illinois v. Milwaukee,* the Act provided no authority for Illinois to enforce its provisions against an entity of a neighboring state. Moreover, as this Court noted, "[t]he remedy sought by Illinois [was] not within the precise scope of remedies prescribed by Congress." *Illinois v.*

Milwaukee, 406 U.S. at 103. Accordingly, the Court turned then to the common law as a "necessary expedient" to resolve the interstate pollution controversy brought before it. *Committee For Jones Falls Sewage System v. Train,* 539 F.2d 1006, 1008 (4th Cir. 1976).

With the passage of the new Act, such resort to common law theories is no longer necessary. Enforcement procedures have been "greatly strengthen[ed]." *Illinois v. Milwaukee,* 599 F.2d at 158. Now, any "person ... having an interest which is or may be adversely affected" has a right to sue to secure compliance with the Act against any person alleged to be in violation, sec. 505(g). States may invoke the power of the EPA to abate pollution originating outside their borders; under sec. 505(h) the EPA's aid in such cases is obligatory. Section 505(h) also gives the governor of any state the right to file civil suit against regulatory officials if they fail to enforce an effluent standard set under the Act.

The new Act also constituted a major revision in substantive terms. It declared unlawful all discharges of pollutants, except as authorized under National Pollutant Discharge Elimination System (NPDES) permit. Direct discharge limitations, based on technology, are prescribed by EPA and authorized state agencies for all industrial and municipal dischargers of pollutants into the nation's waterways. Opportunities are provided for other affected states to comment on the appropriateness of the limitations to be imposed on any discharger, secs. 402 (b) (3), (5).

This Court in *Illinois v. Milwaukee,* 406 U.S. at 107, foresaw the time where "new federal laws and new federal regulations may ... preempt the field of federal common law of nuisance." In fact that time has arrived. The Act's procedural and substantive

gaps have been filled. States now have both effective enforcement authority under the Act and appropriate opportunities to participate in the administrative standard-setting process in other states. The remedy sought by Illinois — the setting of effluent standards and limitations — is now within "the precise scope of remedies prescribed by Congress." The current statutory scheme nullifies both the reason and the necessity for resort to federal common law to set standards and limitations to control discharges of pollutants into interstate waters.

Accordingly, "federal common law [in this area] of course must give way to federal statutes." *Handbook on Environmental Law* (West Pub. Co. 1977) at p. 154.[5]/

Because the Court of Appeals reasoned that the Act did not expressly govern the matter of control of overflow discharges, *Illinois v. Milwaukee,* 599 F.2d at 170, it concluded that the Act did not limit the relief available to correct combined sewer overflows under a

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[5]/The author of the *Handbook* also concluded that "[t]he immediate reach of Illinois v. Milwaukee was narrowed by the Federal Water Pollution Control Act Amendments of 1972. Application of the federal common law in the future requires the courts to be alert to whether Congress has made a clear choice in confining the range of available remedies."

The Eighth Circuit Court of Appeals has also expressed reluctance to fashion federal common law in light of the comprehensiveness of the amended FWPCA. In *Reserve Min. Co. v. Environmental Protection Agcy,* 514 F.2d 492, 532 (8th Cir. 1975), which involved an action brought by the United States and the State of Minnesota against a taconite

common law theory. However, it acknowledged that even where a statute does not expressly govern a particular case, a court "should look to its policies and principles for guidance," *Illinois v. Milwaukee*, 599 F.2d at 164. Wisconsin submits that congressional policy concerning combined sewer overflows as expressed in other provisions of the Act and especially as administered in the NPDES permit system should have guided the court in fashioning relief here.

As recognized by the Court of Appeals, regulation of combined sewer overflows is implicit in the provisions of the Act prohibiting discharges for public treatment works not meeting secondary treatment requirements, *Id.* Accordingly, the discharge permits issued to Milwaukee required it to "'initiate' programs 'leading to the elimination or control of all discharge overflow and/or bypass points.'" *Id.* Moreover, the state court suit brought to enforce the provisions of Milwaukee's permits imposed a comprehensive obligation on the city to correct the problem of overflows from its combined sewer system. *Id.* The plan for correction requires the expenditure of many millions of dollars over a period of many years, and it is inextricably intertwined with other provisions of the judgment requiring upgrading of Milwaukee's sewage

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processing company to prevent the company from continuing the discharge of wastes into Lake Superior, the court of appeals declared:

> The district court also found that Reserve's discharge into Lake Superior constituted a nuisance under the federal common law of nuisance ... Because relief may appropriately rest on provisions of the FWCPA and on a violation of the Refuse Act, we deem it unnecessary and, indeed, unwise to also rely on federal nuisance law.

treatment facilities and requiring the city to coordinate a district-wide effort to correct overflow problems in the separate sewer systems of nearby municipalities.[6]/

Correction of combined sewer overflows is an integral part of the comprehensive remedial program ordered by the State to implement congressional policy as expressed in comprehensive legislation. In contrast, the remedy ordered by the district court and sustained on appeal, which disregards the judgment of the state as to both the substantive relief measures required and the carefully-planned schedule by which they must be completed, can only disrupt the NPDES state enforcement process. Wisconsin believes that such undermining of its efforts should not be lightly approved, for "[w]here a decision is likely to have a substantial effect on the implementation of a federal program, then a federal court should declare a rule consistent with the program's demands." *United States v. Carson,* 372 F.2d 429, 432 (6th Cir. 1967).

The remedy ordered by the district court also undermines the comprehensive administrative process of regulation created by Congress to resolve issues of interstate pollution. That process requires states to

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[6]/It is important to understand how the Wisconsin Judgment requirement that Milwaukee correct all combined sewer overflows differs from the requirement of the Illinois district court to eliminate all combined sewer overflows. The regulations established by EPA under the Federal Water Pollution Control Act Amendments of 1972 require preparation of a detailed Facilities Plan, an overall analysis of the pollution abatement problems to be addressed with an analysis of the technological alternatives available as remedies. The purpose of the Facilities Plan preparation is to determine the most "cost-effective" means of providing the abatement necessary. "Cost-effective" has been

notify other states when permits which may affect their interests are proposed, issued, or modified. Congress has also required that such affected state, on request, be afforded a hearing on any permit application or the terms and conditions incorporated into any issued permit or permit modification.[7]/

The State of Illinois receives notice of all permit actions affecting Lake Michigan. It received notice of the original permits proposed for the Milwaukee treatment plants in 1974, and notice again when those permits were issued in late 1974 and early in 1975. Similarly, the State of Illinois received notice of the Department's intention to reissue permits to South Shore and Jones Island in 1978, and notice of the actual reissuance of those permits in 1978.

One of the terms and conditions of the permits issued to Milwaukee was an obligation to initiate measures to control combined sewer overflows. Illinois

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defined in 40 C.F.R. Part 35, Appendix A (1979), to mean:

> b. *Cost-effectiveness analysis.* An analysis performed to determine which waste treatment management system or component part will result in the minimum total resources costs over time to meet Federal, State, or local requirements.

The State of Wisconsin's definition of "cost-effectiveness" is in accord with the federal. Section NR 110.03 (3), Wis. Adm. Code, defines the concept as follows:

> "Cost-effective analysis" means a systematic comparison of alternative means of meeting state water quality standards, effluent limitations or other treatment standards in

clearly had many opportunities to comment on the remedial steps required to resolve the combined sewer overflow problem, yet it never took any of these opportunities to "make its case" against Milwaukee in the administrative forum. At no time did Illinois submit comments to the Department of Natural Resources on the Milwaukee permits, participate in permit hearings, or seek a hearing on its own motion. *The State of Illinois has totally refused to utilize that administrative forum, with its technical expertise, which remains available to it* for purposes of making its case. It chose instead to present its case in the judicial forum, where the expertise does not exist, and in so doing ignored the forum for resolution of these issues which Congress clearly intended. It seems reasonable that the congressional purpose of developing effective pollution control programs through application of sound technology forged in the administrative process should not be defeated by remedies created outside that process. The regulatory

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order to identify the alternative which will minimize the total resources costs over the planning period. These resources costs include monetary costs and environmental as well as other non-monetary costs.

At the completion of the Facilities Planning process the precise remedy to the combined sewer overflows will be determined by the Wisconsin Department of Natural Resources and Department of Justice as required by the Wisconsin Judgment based on the comprehensive and detailed analysis of the problem and the available remedies. In contrast, the order of the Illinois court was based on limited information as to both the nature of the problem as well as the technological alternatives available and the remedial benefit of each such alternative.

process created by Congress to resolve these issues must govern as to the remedial measures to be imposed. *See Ivy Broadcasting Co. v. American Tel. & Tel. Co.*, 391 F.2d 486, 491 2nd Cir. (1968).

Moreover, in this case, not only has Congress provided a comprehensive statutory program of regulation inconsistent with a common law patchwork, but also the specific problem presented to the federal court for decision had been addressed and resolved in the state court. The case for congressional preemption must be even stronger where, as here, congressional policy has already been applied at the time the federal judiciary is called upon to act.

The remedy imposed by the State represents application of the highest scientific expertise, conforms to the long-range goals set by Congress, and is consistent with uniform, orderly administration and enforcement of our nation's water pollution control program. The judgment of the federal court leads to regulatory chaos. Progress toward consistent, uniform improvement in water quality demands that solutions to problems of water pollution flowing directly from the congressional mandate preempt conflicting procedures.

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[7]/Wisconsin statutory sections securing these rights include secs. 147.09, 147.11, 147.13, and 147.20, Wis. Stats.

III. Assuming That A Federal Common Law Nuisance Action Survives, The District Court Should Have Deferred To The Judgment Of The Wisconsin State Court Entered Pursuant To State And Federal NPDES Requirements And Refrained From Imposing A Different Remedy.

The Seventh Circuit specifically considered and rejected the argument that the enactment of the FWPCA had preempted the federal common law of nuisance in the area of water pollution. Should this Court sustain that determination, a question of equal if not greater importance remains: how are the two authorities to operate effectively in the same arena?

Municipalities across the nation will suffer much confusion and unnecessary expense if guidelines on the use of federal common law are not developed by this Court. Similarly, those states such as Wisconsin which are charged with fulfilling their obligations under the national NPDES scheme will find their efforts frustrated, subject to collateral attack, and possibly countermanded by federal courts which choose to fashion remedies completely independent of those imposed by the state.[8]/

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[8]/It is the State's position that compliance with state law is required regardless of whether federal financial assistance can be made available. However, the State agrees that in a situation such as that faced by Milwaukee, where the pollution abatement program necessary to comply with the law will extend over several decades and cost hundreds of millions of dollars, cost to the taxpayers can and should be

The abatement program developed by the State of Wisconsin pursuant to the comprehensive NPDES regulatory scheme must preempt the *ad hoc* problem solving engaged in by the federal court. Basic principles of abstention and comity demand that independent judicial approaches to problem-solving in this area give way to programs developed under congressional authorization.

A. Comity and Abstention.

Had the State of Wisconsin initiated its action against the Milwaukee Commissions prior to the filing of the federal action, we would emphatically assert that the doctrine of abstention required the federal court to refuse to exercise its jurisdiction.

Abstention is proper for reasons of judicial economy so that one lawsuit will suffice to dispose of the problem, rather than permitting two with the possibility of conflicting results as well as multiple costs. *White v. Husky Oil Co.*, 266 F. Supp. 239 (D. Mont. 1967). Equitable restraint should be exercised by a federal court where granting of relief would adversely affect the results of a state court action. *Sartin v. Commissioner of Public Safety of St. Of Minn.*, 535 F.2d 430 (8th Cir. 1976). Further, it is the duty of a federal court to avoid unseemly conflict with a state court. *Landis v. Northern American Co.*, 299 U.S. 248 (1936). Implicit in these pronouncements is the notion

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recognized in the *timetable* established for compliance. The Wisconsin Judgment specifically treats the issues of compliance with the requirements and means of financing separately and in this fashion by establishing priorities and interrelated deadlines for the projects. The federal court's disregard for cost and priorities imposed by Wisconsin threatens the State's carefully laid plans for abatement.

that an action involving substantially the same question is pending in another forum which can provide an adequate remedy. *Butler v. Judge of U.S. District Court,* 116 F.2d 1013 (9th Cir. 1941). Neither the parties in the state court nor the issues need be identical. *Landis.*

Abstention is an equitable doctrine founded on the court's exercise of judicial discretion, to be exercised when the federal district court believes that some asset peculiar to the state court's jurisdiction will most likely aid in adjudicating the merits of the litigation. *Cochran v. Ensweiler,* 372 F. Supp. 471, 473 (D.C. Ind. 1974). Although it is clear that the doctrine of abstention is not normally invoked when, as here, the federal action was initiated first, the guiding principles of that doctrine and the doctrine of comity strongly support the State's position that substantial deference to the state court and the NPDES requirements was required when the federal court reached the point of establishing the proper remedy. The "asset peculiar to the state court's jurisdiction" in this case is that it had already imposed a remedy consistent with the requirements of the federal and state NPDES programs to solve the identical problem the federal court action sought to resolve. Federal court invocation of the comity principle at the point of establishing the remedy would have had substantial value here in securing uniformity of decision and remedy. *Lauer v. Freudenthal,* 96 Wash. 394, 165 P. 98 (1917).

Our constitutional system recognizes the principle of deference by one branch of government to another within each branch's sphere of influence. Congress, a coordinate political department, has constitutional authority to regulate and protect interstate waterways. The specialized nature of the subject requires deference. The correction of overflows from combined sanitary and storm sewers, for example, involves

technical determinations to which the courts bring little expertise. The district court admitted it found the data presented incomprehensible. Congress gave the EPA the primary task of administering the program, and gave it authority, in turn, to delegate this responsibility to the various states. The expertise employed by the State of Wisconsin Department of Natural Resources in designing a remedy for the water pollution problem here was employed pursuant to the delegation of authority from the EPA and ultimately the Congress. The remedy imposed on Milwaukee derived, then, from the congressional mandate. The state court judgment was entered pursuant to the comprehensive federal scheme embodied in federal statutes.

The trial court should have deferred to the legislative judgment and accepted as its guide the decision of the Congress regarding what is necessary to protect interstate waters. At the very least it was incumbent upon the federal court to inform itself of the requirements of the Wisconsin Judgment and to reach a determination as to that remedy's ability to meet the needs of the plaintiffs, Illinois and Michigan. Absent such an evidentiary determination regarding the state's remedy, the federal court was unable to determine the need for it to act. Had such an inquiry been made and had the court been satisfied, as we submit it would, that the state remedy was sufficient, it should then have deferred to that expertise in establishing the remedy. Failing to do so, a federal court risks interruption and frustration of the national pollution abatement process which Congress intended to establish.

This principle of deference is akin to the separation of powers doctrine and is best explained in terms of its similarity to the political question doctrine under

which courts decline to decide issues more properly resolved by another branch of government.

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards of resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decison already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962).

This Court has declared "in the abstention context," that "the federal court should not exert jurisdiction if the plaintiffs had an *opportunity* to present their federal claims in the state proceedings." *Moore v. Sims,* 99 S.Ct. 2371, 2378 (1979), quoting *Juidice v. Vail,* 430 U.S. 327, 337 (1977) (emphasis in original). Under similar principles, Wisconsin submits, Illinois should have utilized the opportunities available to participate in the state permit-issuing process. The NPDES/WPDES program provided an adequate administrative forum for consideration of the water pollution and public health related issues raised by Illinois. Illinois chose to ignore this process and instead go to the federal court.

B. Lack of Emergency.

Under well-settled principles of equity jurisprudence, injunctive relief should be granted only when the right to relief is clear. *Missouri v. Illinois,* 180 U.S. 208, 248 (1901). Moreover, "[t]he *Younger* doctrine, which counsels federal court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff." *Moore v. Sims,* 99 S.Ct. 2371, 2377 (1979). Plainly, there was no compelling need for the court to impose the remedy it did. There was no sudden, dramatic increase in the rate or amount of effluents discharged into the lake, no sudden decrease in water quality near Chicago attributable to Milwaukee, and no evidence of a water-borne outbreak of disease among Chicago residents. Furthermore, the remedy, involving tremendous additional costs to Milwaukee area residents, was imposed without evidence that commensurate additional benefits would accrue to Illinois.

Similarly, we suggest that under established principles of abstention, comity and judicial deference to legislative judgment a court is obliged to act, if at all, with great restraint. We respectfully suggest that if this Court finds that the federal common law of nuisance survives the federal Act, the Court must fashion and require strict adherence to a rule limiting exercise of jurisdiction in these cases to genuine emergency cases, imposing liability only on a clear and convincing showing of a clear and present (not potential) danger, and fashioning a remedy only where the link between the remedy and the harm to be alleviated is beyond dispute and the responsible state government has clearly failed to act. No such showing was made in this case. These circumstances dictate that the District Court should have permitted

Milwaukee to proceed to implement the remedy imposed by the state court according to the schedule approved by that court.

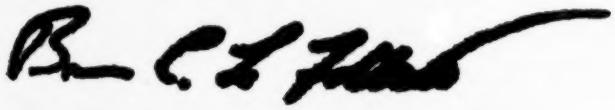
CONCLUSION

The federal common law remedy fashioned by the District Court below was unwarranted in light of the comprehensiveness of the 1972 Amendments to the Federal Water Pollution Control Act. Pursuant to the Act, EPA has prescribed technologically-based direct discharge limitations for all point sources of pollution, and these controls are more than adequate to protect the nation's interstate waters. Moreover, the Act now provides mechanisms whereby both State governments and private citizens can seek direct enforcement of these standards. There is, therefore, no need for a District Court to fashion a common law remedy. It is a well accepted principle of law that federal common law remedies must give way to those prescribed by Congress in comprehensive legislation.

Even if the 1972 Amendments have not preempted the federal common law of nuisance regarding control of pollutants in the circumstances of this case, the District Court should, nevertheless, have deferred to the judgment of the Wisconsin State Court entered pursuant to the State and Federal NPDES requirements. The remedy imposed by the State Court comprised a thorough solution to the identical problem before the District Court. Since this remedy was derived from the federally prescribed standards for water pollution control and imposed to implement congressional policy, basic principles of comity and the federal interest in securing uniformity of decision should have prompted the District Court to defer to the State Court's judgment.

The Court of Appeals' ruling should be reversed insofar as it affirms the District Court's order relating to combined sewage overflows.

Respectfully submitted,



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